Supreme Court, U.S.
FILED

011765 MAY 28 2002

OFFICE OF THE CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD E. EARLY, Warden, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *Petitioners,*

v.

WILLIAM PACKER, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
ROBERT R. ANDERSON
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
KEITH H. BORJON
Supervising Deputy Attorney General
KENNETH C. BYRNE
Supervising Deputy Attorney General
KENNETH N. SOKOLER
Deputy Attorney General
Counsel of Record
300 South Spring Street
Los Angeles, CA 90013
Telephone: (213) 620-6064
Fax: (213) 897-2808
Counsel for Petitioners

25095

QUESTIONS PRESENTED

Title 28 U.S.C. § 2254(d)(1), as amended by the Antiterrorism and Effective Death Penalty Act of 1996, narrows the circumstances in which federal courts can grant a state prisoner's petition for writ of habeas corpus on a claim that the state court has previously rejected on the merits. One of these circumstances exists when the state court's decision is "contrary to" this Court's clearly established precedent. The questions presented here concern the interpretation of the term "contrary to" and the issue of what constitutes controlling precedent. The questions are:

1. When a state-court decision does not reach a conclusion opposite to a conclusion reached by this Court on an identical issue of federal constitutional law, is the decision nonetheless "contrary to" this Court's precedent, under 28 U.S.C. § 2254(d), merely because the state court did not expressly employ the legal standard set forth in this Court's precedent and explicitly apply every factor of this Court's analysis to the facts of the case?

2. Do this Court's decisions comprise "clearly established federal law," for the purpose of 28 U.S.C. § 2254(d)(1), if they do not address federal constitutional issues?

TABLE OF CONTENTS

	Page
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	2
RELEVANT STATUTORY PROVISION	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	7
THE NINTH CIRCUIT'S OPINION EVISCERATES THE DEFERENCE STANDARD OF 28 U.S.C. § 2254(d)(1), IS INCONSISTENT WITH THE MAJORITY OF OTHER FEDERAL CIRCUITS, AND IMPERMISSIBLY EXPANDS HABEAS CORPUS JURISDICTION	7
ARGUMENT	10
I. BY HOLDING THAT STATE-COURT DECISIONS CAN BE "CONTRARY TO" SUPREME COURT PRECEDENT, EVEN WHEN THEY DO NOT REACH A CONCLUSION OPPOSITE THAT REACHED BY THIS COURT ON A QUESTION OF LAW, THE NINTH CIRCUIT HAS EVISCERATED THE AEDPA'S DEFERENCE STANDARD AND IMPERMISSIBLY BROADENED THE FEDERAL COURTS' AUTHORITY TO GRANT THE WRIT	10
II. THE NINTH CIRCUIT'S INTERPRETATION OF 28 U.S.C. § 2254(d)(1) IS INCONSISTENT WITH THE MAJORITY OF OTHER FEDERAL CIRCUITS	14
III. BY TREATING THIS COURT'S HOLDINGS ON NONCONSTITUTIONAL ISSUES AS CONTROLLING FEDERAL AUTHORITY FOR PURPOSES OF 28 U.S.C. § 2254(d)(1), THE NINTH CIRCUIT PERMITS FEDERAL COURTS TO GRANT RELIEF FOR ALLEGED ERRORS THAT ARE NOT OF CONSTITUTIONAL MAGNITUDE, THEREBY IMPERMISSIBLY EXPANDING HABEAS CORPUS JURISDICTION	16
CONCLUSION	18

TABLE OF CONTENTS (continued)

	Page
THE FEDERAL COURTS' AUTHORITY TO GRANT THE WRIT	10
II. THE NINTH CIRCUIT'S INTERPRETATION OF 28 U.S.C. § 2254(d)(1) IS INCONSISTENT WITH THE MAJORITY OF OTHER FEDERAL CIRCUITS	14
III. BY TREATING THIS COURT'S HOLDINGS ON NONCONSTITUTIONAL ISSUES AS CONTROLLING FEDERAL AUTHORITY FOR PURPOSES OF 28 U.S.C. § 2254(d)(1), THE NINTH CIRCUIT PERMITS FEDERAL COURTS TO GRANT RELIEF FOR ALLEGED ERRORS THAT ARE NOT OF CONSTITUTIONAL MAGNITUDE, THEREBY IMPERMISSIBLY EXPANDING HABEAS CORPUS JURISDICTION	16
CONCLUSION	18

TABLE OF AUTHORITIES

Cases	Page
Bell v. Jarvis, 236 F.3d 149 (4th Cir. 2000)	14
Cruz v. Miller, 255 F.3d 77 (2d Cir. 2001)	14
Darden v. Wainwright, 477 U.S. 168 (1986)	17
Delgado v. Lewis, 223 F.3d 976 (9th Cir. 2000)	14
Harris v. Stovall, 212 F.3d 940 (6th Cir. 2000)	14
Hennon v. Cooper, 109 F.3d 330 (7th Cir. 1997)	14
Hurtado v. Tucker, 245 F.3d 7 (1st Cir. 2001)	14
James v. Bowersox, 187 F.3d 866 (8th Cir. 1999)	14
Jenkins v. United States, 380 U.S. 445 (1965)	8, 12, 16, 17
Lindh v. Murphy, 521 U.S. 320 (1997)	10, 14

TABLE OF AUTHORITIES (continued)

	Page
Lowenfield v. Phelps, 484 U.S. 231 (1988)	12, 17
Matteo v. Superintendent, SCI Albion, 171 F.3d 877 (3d Cir. 1999)	15
Neal v. Puckett, 239 F.3d 683 (5th Cir. 2001)	14
Packer v. Hill, 277 F.3d 1092 (9th Cir. 2002)	8, 12, 16, 17
Penry v. Johnson, 532 U.S. 782 (2001)	12
Pickens v. Gibson, 206 F.3d 988 (10th Cir. 2000)	14
Ramdass v. Angelone, 530 U.S. 156 (2000)	12
Santellan v. Cockrell, 271 F.3d 190 (5th Cir. 2001)	14
Sellan v. Kuhlman, 261 F.3d 303 (2d Cir. 2001)	14
Smith v. Phillips, 455 U.S. 209 (1982)	8, 17
United States v. United States Gypsum Co., 438 U.S. 422 (1978)	8, 16, 17

TABLE OF AUTHORITIES (continued)

	Page
Williams v. Taylor, 529 U.S. 362 (2000)	7, 8, 11-13, 15
Wright v. Secretary for Dept. of Corrections, 278 F.3d 1245 (11th Cir. 2002)	14
Statutes	
28 U.S.C. § 2254	7, 8, 10-12, 14, 15, 17
Pub. L. No. 104-132, 110 Stat. 1218	7
Other Authorities	
Kent S. Scheideggar, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 Colum. L.Rev. 888 (1998)	15
Webster's Third New International Dictionary 495 (1976)	11

IN THE SUPREME COURT OF THE UNITED STATES

No.

RICHARD E. EARLY, Warden, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *Petitioners,*

v.

WILLIAM PACKER, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

Richard E. Early, Warden of North Kern State Prison, and the Attorney General of the State of California (hereafter collectively referred to as "the State") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.[1/]

OPINIONS BELOW

The second amended opinion of the United States Court of Appeals appears at Appendix A. The first amended opinion of the United States Court of Appeals appears at

---

1. In the proceedings in the Ninth Circuit, Warden Don Hill of the California Correctional Institution was listed as Respondent Packer's custodian. On March 20, 2002, Packer was transferred to North Kern State Prison; hence, Mr. Early is now his custodian.

Appendix B and is reported at 277 F.3d 1092 (9th Cir. 2002). The original opinion of the United States Court of Appeals appears at Appendix C. The United States District Court's unreported judgment appears at Appendix D. The district court's order adopting the findings, conclusions, and recommendation of the United States magistrate judge appears at Exhibit E. The amended report and recommendation of the United States magistrate judge appears at Appendix F. The California Supreme Court's unreported order denying review appears at Appendix G. The California Court of Appeal's unreported opinion appears as Appendix H.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued an amended opinion and denied the State's petition for rehearing and suggestion for rehearing en banc on February 27, 2002. Appendix B. This Petition for Writ of Certiorari follows within 90 days. The State invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Section 2254(d) of Title 28 of the United States Code provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -- [¶] (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or [¶] (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding

STATEMENT OF THE CASE

On September 24, 1987, Packer and two cohorts went to a drug dealer's apartment in Hollywood, California, intending to rob him. Packer struck two victims in the head, using his gun to hit one of them. He also shot and seriously wounded a security guard who worked at the apartment building. The bullet passed through the security guard and killed one of Packer's accomplices.

During deliberations, the jury submitted guilty verdicts on two counts of attempted robbery, two counts of assault with a deadly weapon, and one count of assault with a firearm. The jury also returned not-guilty verdicts on ten other counts. With one count of murder and one count of attempted murder still unresolved, a juror, Eve R.,[2/] sent the trial court a note requesting dismissal due to health problems. The court held an in-camera conference with juror Eve R., who was not having health problems but was instead experiencing the strain of serving on a jury in a case involving serious charges. After speaking with the court, juror Eve R. agreed she could continue deliberating. The court then mentioned that deliberations would have to start again if juror Eve R. were dismissed.

The next day, the jury foreperson sent the court a note complaining that juror Eve R. did not understand the rules and was not being reasonable. The court read the note aloud in the jury's presence and asked whether it was still deliberating. The foreperson confirmed that the jury was, in fact, still deliberating. The court asked about the jury's numerical division, and the foreperson said the last vote was eleven to one. Without being

---

2. In the interest of privacy, the State will refrain from using juror Eve R.'s last name. *Cf.* Cal. Civ. Proc. Code § 237(a)(2).

asked, the foreperson added that the previous vote had been ten to two. In response to jurors' questions, the court said the jury was required to follow the law as instructed and directed the jurors to the instructions they had previously received.

When deliberations reconvened two days later, juror Eve R. sent the court a note asking again to be dismissed, and the court met with her in counsels' presence. Juror Eve R. told the court about her difficulties with the other jurors but confirmed that she and the rest of the jury were still deliberating. The court asked the foreperson if the jury could deliberate further, and the foreperson said the jury was making progress and deliberating. The court excused the jury for a three-day weekend. On the day that proceedings reconvened, the jury returned a guilty verdict on the attempted murder charge. The next day, it returned a guilty verdict on the murder charge.

On direct appeal, Packer argued that the trial court's actions and statements during deliberations had "coerced" a verdict. In a reasoned, unpublished opinion, the California Court of Appeal rejected this claim on the merits.[3] Appendix H. The California Supreme Court denied Packer's petition for review. Appendix G. Packer then filed a habeas corpus petition in the United States District Court. He argued, in part, that the trial court coerced a verdict. The magistrate judge expressed doubt as to whether the coercion claim was cognizable, because there was no controlling Supreme Court authority under 28 U.S.C. § 2254(d)(1). The magistrate judge further found that the claim was meritless under Ninth Circuit authority and

---

3. In California, intermediate appellate courts are permitted to publish opinions only when the opinions establish a new rule of law, apply an existing rule to a novel set of facts, give reasoned criticism of an existing rule, resolve or create an apparent conflict in the law, involve a legal issue of continuing public interest, or make a significant contribution to the legal literature by reviewing the history of a rule or law. Cal. Ct. R. 976(b).

recommended the entire petition be denied. Appendix F. The district court adopted the report and recommendation and denied the petition. Appendices D, E.

The district court granted Packer a certificate of appealability on his juror-coercion claim and one other claim. The Ninth Circuit issued its original opinion on January 15, 2002. In a majority opinion by Judge Pregerson, joined by Judge Reinhardt, a divided court reversed the district court and held that Packer's Fourteenth Amendment rights were violated because there was a strong likelihood the trial court's statements and actions coerced juror Eve R. into changing her vote. The court held that the California Court of Appeal's decision was "contrary to" Supreme Court authority, within the meaning of 28 U.S.C. § 2254(d)(1) ("§ 2254(d)(1)"), because it did not apply the "totality of the circumstances" test for juror coercion set forth in *Jenkins v. United States*, 380 U.S. 445, 446 (1965), and *Lowenfield v. Phelps*, 484 U.S. 231, 237 (1988). Appendix C.

Additionally, the Ninth Circuit held that the state court of appeal's opinion was contrary to Supreme Court authority because its "partial rationale" directly contradicted such authority. This "partial rationale" was the court of appeal's statement that there is nothing improper in urging the jury to consider a case further with the view to reaching an agreement, as long as the language used does not coerce a particular type of verdict. The Ninth Circuit held that this was directly contrary to *Jenkins v. United States,* 380 U.S. at 446, and *United States v. United States Gypsum Co.*, 438 U.S. 422, 460 (1978). Appendix C.

The Ninth Circuit also stated that the court of appeal failed to consider whether a federal constitutional violation occurred. Appendix C. In point of fact, however, the court of appeal's discussion appeared under the heading "The Court's Comments to the Jury Were Not so Coercive as to Deny Packer a *Fair and Impartial Jury* or *Due Process*." Appendix H (emphasis added). Moreover, the court of appeal ultimately concluded that "the comments made and not made by the court

to the jury did not coerce a particular verdict or deny Packer any *constitutional* rights." *Id.* (emphasis added).

Having determined that the state-court decision was contrary to Supreme Court precedent under § 2254(d)(1), the Ninth Circuit then considered Packer's coercion claim without applying any deference. Relying on its own case law, the Ninth Circuit held that the trial court's actions and statements coerced a verdict from juror Eve R., and the writ should therefore be issued, because the error had a "substantial and injurious" effect on the verdict. Appendix C (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). The Ninth Circuit relied, in part, on cases in which it decided juror-coercion claims under its supervisory authority, and not under the Constitution. Appendix C (citing *United States v. Ajiboye*, 961 F.2d 892 (9th Cir. 1992), and *United States v. Sae-Chua*, 725 F.2d 530 (9th Cir. 1984)). In dissent, Judge Silverman rejected the juror-coercion claim and found that the state-court decision did not contradict or unreasonably apply Supreme Court precedent. Appendix C.

On February 27, 2002, the Ninth Circuit denied the State's petition for rehearing with suggestion for rehearing en banc, but amended the original opinion to delete its prior holding that the State had waived its argument regarding exhaustion. Appendix B. On May 6, the Ninth Circuit again amended the opinion. In the amendment, the Court clarified that it was granting the writ only as to Packer's murder and attempted-murder convictions, and not his five additional counts of conviction. Appendix A.

REASONS FOR GRANTING THE PETITION

THE NINTH CIRCUIT'S OPINION EVISCERATES THE DEFERENCE STANDARD OF 28 U.S.C. § 2254(d)(1), IS INCONSISTENT WITH THE MAJORITY OF OTHER FEDERAL CIRCUITS, AND IMPERMISSIBLY EXPANDS HABEAS CORPUS JURISDICTION

Title 28 U.S.C. § 2254(d)(1), as amended in the Antiterrorism and Effective Death Penalty Act of 1996[4] ("AEDPA"), strictly limits the conditions in which federal courts can grant the writ of habeas corpus as to a state prisoner on a claim previously rejected on the merits in state court. One of these circumstances exists when the state court's decision is "contrary to" this Court's controlling precedent. With its published opinion in the instant case, the Ninth Circuit has stripped the "contrary to" prong of any substantial effect and broadened the definition of "controlling precedent" far beyond that contemplated by § 2254(d)(1).

The Ninth Circuit's interpretation of "contrary to" is irreconcilable with this Court's definition of the term. According to this Court, a state-court decision is "contrary to" this Court's precedent if it "arrives at a conclusion opposite to that reached by this Court on a question of law." *Williams v. Taylor*, 529 U.S. 362, 405 (2000). The Ninth Circuit construes the "contrary to" clause far more broadly. By so doing, it gives federal courts unwarranted leeway to grant the writ and eviscerates § 2254(d)(1)'s deference standard.

Instead of considering whether the state court reached a conclusion "opposite to that reached by this Court on a question of law," the Ninth Circuit grades state courts on the quality of their opinion-writing. According to the Ninth Circuit, if the state court fails to expressly apply the governing legal standard, fails to explicitly analyze the issue in a manner

---

4. Pub. L. No. 104-132, 110 Stat. 1218.

consistent with that standard, or fails to specifically discuss all the facts the federal court deems pertinent, then the state court's decision is "contrary to" this Court's precedent, regardless of the actual outcome. *Packer v. Hill* ("*Packer*"), 277 F.3d 1092, 1101-02, 1105 (9th Cir. 2002).

Such an expansive interpretation of the "contrary to" clause is a far cry from this Court's description of "a conclusion opposite to that reached by this Court on a question of law." *Williams v. Taylor*, 529 U.S. at 405. It undercuts § 2254(d)(1)'s deference standard by granting federal courts unfettered license to upset state-court judgments based on quibbles with the state court's draftsmanship, regardless of the state court's ultimate legal conclusion. Such an interpretation turns § 2254(d)(1)'s "contrary to" prong into a deference standard without any teeth.

The Ninth Circuit's interpretation of the "contrary to" clause is also incongruous with decisions by four other federal circuits, which hold that courts applying § 2254(d)(1) should look to the state court's ultimate legal conclusion and should not grade the state court on its opinion writing. Furthermore, the Ninth Circuit's holding is inconsistent with decisions by eight circuits -- including the Ninth Circuit itself -- which accord full deference under § 2254(d)(1) when the state court gives *no* explanation for its decision.

Besides divesting § 2254(d)(1)'s "contrary to" prong of any force, the Ninth Circuit establishes its own unique standard regarding what constitutes controlling federal law under § 2254(d)(1). According to this Court, federal habeas relief is available to state prisoners only for convictions obtained in violation of the Constitution. *Smith v. Phillips*, 455 U.S. 209, 221 (1982). It follows that only this Court's holdings on *constitutional* questions are controlling authority under § 2254(d)(1).

Here, however, the Ninth Circuit relies as controlling authority on decisions that are based on this Court's supervisory authority over the lower federal courts, not on the Constitution. *Packer*, 277 F.3d at 1102 (citing *United States v. United States Gypsum Co.*, 438 U.S. at 461, and *Jenkins v. United States*, 380

U.S. at 446). This means the writ can be granted based on alleged errors that are *not of constitutional magnitude*. The Ninth Circuit's decision in the instant case thus impermissibly expands the federal courts' jurisdiction to grant the writ.

ARGUMENT

I.

BY HOLDING THAT STATE-COURT DECISIONS CAN BE "CONTRARY TO" SUPREME COURT PRECEDENT, EVEN WHEN THEY DO NOT REACH A CONCLUSION OPPOSITE THAT REACHED BY THIS COURT ON A QUESTION OF LAW, THE NINTH CIRCUIT HAS EVISCERATED THE AEDPA'S DEFERENCE STANDARD AND IMPERMISSIBLY BROADENED THE FEDERAL COURTS' AUTHORITY TO GRANT THE WRIT

Title 28 U.S.C. § 2254(d), as amended in the AEDPA, constitutes a "new, highly deferential standard for evaluating state court rulings." *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997). It defines three -- and only three -- conditions in which the federal habeas court can grant a state prisoner's petition for writ of habeas corpus on a claim previously adjudicated on the merits in state court.

First, the federal court can grant the writ if the relevant state-court decision was "contrary to . . . clearly established Federal law," as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1). Second, the federal court can grant the writ if the relevant state-court decision "involved an unreasonable application of . . . clearly established Federal law," as determined by the Supreme Court. *Id.* Finally, the federal court can grant the writ if the state-court adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

This Court has accorded independent meaning to the "contrary to" and "unreasonable application" clauses of § 2254(d)(1). *Williams v. Taylor*, 529 U.S. at 405-06. According to this Court, a state-court decision is "contrary to" Supreme Court precedent if it (1) "arrives at a conclusion opposite to that reached by this Court on a question of law," or (2) applies the controlling authority to a case involving facts "materially indistinguishable" from those in the controlling case, but nonetheless reaches a different result. *Id.* This Court further explained that "the word 'contrary' is commonly understood to mean 'diametrically different,' 'opposite in character or nature,' or 'mutually opposed.'" *Id.* at 405 (quoting Webster's Third New International Dictionary 495 (1976)).

Here, in response to Packer's juror-coercion claim, the California Court of Appeal summarized the allegedly coercive events and described Packer's argument on appeal. Specifically, Packer argued that the trial court acted improperly by telling juror Eve R. that deliberations would have to begin anew if she were excused. He further argued that the trial court should have made numerous cautionary statements to the jury, should have clarified the law in response to a juror's inquiry, and should have responded to juror Eve R.'s final request to speak with the court alone. Appendix H.

The state court of appeal concluded that the trial court injected an "irrelevant factor" by telling juror Eve R. that deliberations would have to start again if she were excused, but this did not impose improper pressure. The court contrasted this statement with a situation where the trial court advises a juror that the case must be decided at some time. The court of appeal concluded it might have been proper for the trial court to make the cautionary remarks Packer suggested, but the trial court was not required to do so. The court of appeal found no error in the trial court's decision to refrain from addressing the jury's inquiry about the law. The court of appeal thus concluded that the "comments made and not made" by the trial court did not coerce a particular verdict or deny Packer any constitutional rights. Appendix H.

The Ninth Circuit held that the court of appeal's decision was "contrary to" clearly established federal law under § 2254(d)(1) because it "failed to apply clearly established Supreme Court case law." *Packer*, 277 F.3d at 1105. Specifically, the circuit court objected to the fact that the court of appeal "failed to cite to any federal law, much less the controlling Supreme Court precedents." *Id.* at 1101. Moreover, said the circuit court, the court of appeal "failed to apply the totality of the circumstances" test required by *Lowenfield v. Phelps*, 484 U.S. 231, and *Jenkins v. United States*, 380 U.S. 445, and instead "simply mentioned three particular incidents in its analysis and considered each of them separately," without considering their cumulative impact and the impact of certain other actions.[5/] *Packer*, at 1101-02.

Thus, according to the Ninth Circuit, a state-court decision is "contrary to" Supreme Court precedent, within the meaning of § 2254(d)(1), if it (1) fails to expressly apply the

---

5. Notably, the *Lowenfield* Court did not announce or apply any constitutional *test* for assessing juror-coercion claims. It merely held there was no coercion in violation of the Constitution, and warned that in other unspecified circumstances, trial courts could unconstitutionally coerce a verdict. The second case the Ninth Circuit relied on, *Jenkins*, is not controlling here, because it was based on this Court's supervisory power over the lower federal courts, not on constitutional grounds. *Lowenfield v. Phelps*, 484 U.S. at 239 n.2. Hence, this Court has never articulated a concrete constitutional standard to govern juror-coercion claims.

The instant case thus differs from the cases where this Court applied the "contrary to" clause of § 2254(d)(1). Those cases involved either a distinct, widely-applicable constitutional test, *Williams v. Taylor*, 529 U.S. 362, 391, a constitutional rule triggered by specific circumstances, *Ramdass v. Angelone*, 530 U.S. 156, 166, 178 (2000), or existing precedent that described a specific factual scenario comprising a constitutional violation, *Penry v. Johnson*, 532 U.S. 782, 793-95 (2001).

legal standard governing a constitutional claim (e.g., "totality of the circumstances"), and (2) fails to explicitly analyze the claim in the manner dictated by Supreme Court precedent (e.g., consider the incidents' cumulative effect).

The Ninth Circuit's interpretation of the "contrary to" clause is incompatible with this Court's construction of the same language. Under *Williams v. Taylor*, 529 U.S. 362, a state-court decision is "contrary to" Supreme Court authority "if the state court arrives at a conclusion *opposite* to that reached by this Court on a question of *law*." *Id.* at 405 (emphasis added). The Ninth Circuit's construction of the "contrary to" clause is far broader than the *Williams* standard. Unlike this Court, the Ninth Circuit does not require the state court to reach an "opposite conclusion" on a "question of law"; instead, it focuses on the state court's method of analysis and articulation of such analysis. By construing the "contrary to" clause in a manner inconsistent with this Court's mandate, the Ninth Circuit has impermissibly diminished AEDPA deference and broadened the circumstances in which federal courts can grant the writ.

II.

THE NINTH CIRCUIT'S INTERPRETATION OF 28 U.S.C. § 2254(d)(1) IS INCONSISTENT WITH THE MAJORITY OF OTHER FEDERAL CIRCUITS

Besides conflicting with this Court's authority, the Ninth Circuit's holding is inconsistent with authority from the Second, Fourth, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits -- as well as the Ninth Circuit itself -- holding that state-court adjudications are entitled to deference under § 2254(d)(1), even when the state court does not explain its reasoning process *at all*. *See Wright v. Secretary for Dept. of Corrections*, 278 F.3d 1245, 1254 (11th Cir. 2002); *Santellan v. Cockrell*, 271 F.3d 190, 193-94 (5th Cir. 2001); *Sellan v. Kuhlman*, 261 F.3d 303, 311-12 (2d Cir. 2001); *Bell v. Jarvis*, 236 F.3d 149, 163 (4th Cir. 2000); *Delgado v. Lewis*, 223 F.3d 976, 981-82 (9th Cir. 2000); *Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir. 2000); *Pickens v. Gibson*, 206 F.3d 988, 997 (10th Cir. 2000); *James v. Bowersox*, 187 F.3d 866, 869 (8th Cir. 1999). It is incongruous to apply a *less* deferential approach to decisions where state courts articulate reasons for their decisions than those where they do not. *See Santellan*, 271 F.3d at 194.

The Ninth Circuit's interpretation of § 2254(d)(1) is also incongruous with decisions from four other circuits, which have held, with respect to § 2254(d)(1)'s "unreasonable application" clause, that a sparse or otherwise unsatisfactory state court discussion is not a reason for failing to grant deference. *See Cruz v. Miller*, 255 F.3d 77, 86 (2d Cir. 2001); *Hurtado v. Tucker*, 245 F.3d 7, 20 (1st Cir. 2001); *Neal v. Puckett*, 239 F.3d 683, 696 (5th Cir. 2001); *Hennon v. Cooper*, 109 F.3d 330, 334-35 (7th Cir. 1997).

As these other circuits recognize, the very purpose of § 2254(d)(1), as amended in the AEDPA, is to grant *deference* to state-court rulings on constitutional issues. *See, e.g., Lindh*

v. Murphy, 521 U.S. at 333 n.7 (§ 2254(d) provides a "new, highly deferential standard"); *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 890 (3d Cir. 1999) ("in both houses of Congress section 2254(d) 'was called a "deference" standard by every member who spoke on the question'") (quoting Kent S. Scheideggar, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 Colum. L.Rev. 888, 945 (1998)).

The Ninth Circuit's unique approach in this case seriously undermines such deference. It allows federal courts to maneuver their way around § 2254(d)(1) by (1) decreeing some part of the state court's express analysis, or some statement therein, to be flawed; (2) pinpointing facts that the state court did not expressly consider and deeming them to be pertinent; or (3) faulting the state court for neglecting to explicitly apply the governing standard, regardless of the actual result. This approach does not require anything remotely resembling "a conclusion opposite to that reached by this Court on a question of law." *Williams v. Taylor*, 529 U.S. at 405. Instead of invoking the AEDPA's deference, this standard applies de novo review in AEDPA clothing.

III.

BY TREATING THIS COURT'S HOLDINGS ON NONCONSTITUTIONAL ISSUES AS CONTROLLING FEDERAL AUTHORITY FOR PURPOSES OF 28 U.S.C. § 2254(d)(1), THE NINTH CIRCUIT PERMITS FEDERAL COURTS TO GRANT RELIEF FOR ALLEGED ERRORS THAT ARE NOT OF CONSTITUTIONAL MAGNITUDE, THEREBY IMPERMISSIBLY EXPANDING HABEAS CORPUS JURISDICTION

The Ninth Circuit held that the California Court of Appeal, "[i]n addition to failing to apply controlling Supreme Court law . . . made an explicit statement of law that is contrary to Supreme Court precedent." *Packer*, 277 F.3d at 1102. This "explicit statement of law" was the court of appeal's assertion that "'there is nothing improper in urging the jury to consider a case further with the view to reaching an agreement as long as the language used does not coerce a particular type of verdict.'" *Id.* (brackets omitted).

The Ninth Circuit disagreed with this statement and declared, "the Supreme Court has held a judge's instructions to be coercive simply because it coerced *a* verdict. The error lies in simply pressuring the jurors to arrive at *some* verdict, not in urging the jury to reach a particular verdict." *Packer*, 277 F.3d at 1102. Thus, reasoned the court, "the state court's decision was contrary to clearly established Supreme Court law, not only because it failed to apply the governing law, but also because its partial rationale directly contradicted Supreme Court precedent." *Id.* The state court's "partial rationale" assertedly contradicted the holdings in *United States v. United States Gypsum Co.*, 438 U.S. 422, and *Jenkins v. United States*, 380 U.S. 445. *Packer*, at 1102.

As this Court has noted, however, the holding in *Jenkins* was based on this Court's supervisory power over the lower federal courts, *not* on the Constitution. *Lowenfield v. Phelps*, 484 U.S. at 239 n.2. The same is true of *United States Gypsum Co.*, which, like *Jenkins*, addressed a juror-coercion claim but made no reference to the Constitution. *United States v. United States Gypsum Co.*, 438 U.S. at 459-62.

This Court has ruled that federal habeas relief is *only* available for convictions obtained in violation of the Constitution. *Smith v. Phillips*, 455 U.S. at 221. Federal courts have no supervisory authority over state judicial proceedings. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Hence, only this Court's holdings on questions of *constitutional* law comprise controlling authority under § 2254(d)(1). By decreeing this Court's holdings on *nonconstitutional* issues to be controlling authority for purposes of § 2254(d)(1), the Ninth Circuit has impermissibly expanded the federal courts' jurisdiction to grant the writ.[6]

---

6. In any event, the California Court of Appeal's "partial rationale" did not contradict *Jenkins* or *United States Gypsum Co.* In *Jenkins*, the trial court improperly told the jury, "you have got to reach a decision in this case." *Jenkins v. United States*, 380 U.S. at 446; *see Packer*, 277 F.3d at 1102. In *United States Gypsum Co.*, the trial court held an ex parte discussion with the jury foreperson, which "in all likelihood" led the foreperson to conclude, and inform his fellow jurors, that the court wanted the jury to reach a verdict "one way or the other." *United States v. United States Gypsum Co.*, 438 U.S. at 460-61; *see Packer*, at 1102.

Contrary to the Ninth Circuit's suggestion, the state court of appeal did not assert that trial courts may properly urge juries to reach a verdict. In fact, the court of appeal declared that it would be improper to advise a juror "that the case must at some time be decided." Appendix H. The court of appeal did say it was permissible to urge a jury to "consider the matter further" -- in other words, *deliberate* further -- "with the view

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: May 24, 2002

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

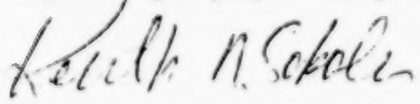
MANUEL M. MEDEIROS
State Solicitor General

ROBERT R. ANDERSON
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

KEITH H. BORJON
Supervising Deputy Attorney General

KENNETH C. BYRNE
Supervising Deputy Attorney General



KENNETH N. SOKOLER
Deputy Attorney General
Counsel of Record

Counsel for Petitioners

---

to reaching an agreement." *Id.*